



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: [REDACTED] Office: Texas Service Center

Date: AUG 15 2000

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[REDACTED]

Public Copy

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

John F. O'Reilly

Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant which seeks to employ the beneficiary permanently in the United States as an foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of August 20, 1997, the filing date of the visa petition.

On appeal, the petitioner provides a letter and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is August 20, 1997. The beneficiary's salary as stated on the labor certification is \$9.57 per hour or \$19,905.60 annually.

The petitioner initially submitted a copy of its 1996 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return reflected gross receipts of \$87,999; gross profit of \$40,475; compensation of officers of \$2,778; salaries and wages of \$0; depreciation of \$11,673; and ordinary income of -\$12,328. Cost of labor was \$7,144. Schedule L reflected total current assets of \$2,727 with \$377 in cash and total current liabilities of \$734.

The director concluded that the document submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On June 24, 1999, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of August 20, 1997.

In response, counsel submitted a copy of the petitioner's 1997 and 1998 Form 1120S U.S. Income Tax Return for an S Corporation; copies of the 1997 and 1998 Form W-2 Wage and Tax Statement for the employees of the company; and copies of the first and second quarter of 1999 Form 941 Employer's Quarterly Federal Tax Return. The 1997 federal tax return reflected gross receipts of \$106,849; gross profit of \$41,600; compensation of officers of \$4,125; salaries and wages of \$0; depreciation of \$23,406; and ordinary income of -\$25,513. Cost of labor was \$6,599. Schedule L reflected total current assets of \$2,815 with \$465 in cash and total current liabilities of \$566. The 1998 federal tax return reflected gross receipts of \$132,662; gross profit of \$61,628; compensation of officers of \$3,605; salaries and wages of \$0; depreciation of \$14,865; and ordinary income of -\$3,939. Cost of labor was \$7,458. Schedule L reflected total current assets of \$17,648 with a loss of \$702 in cash and total current liabilities of \$1,120. The beneficiary did not work for the petitioner in 1997 or 1998 (no Form W-2).

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel provides copies of the federal tax returns previously submitted and a letter from the owner of the company.

Counsel states:

During the years 1997 through 1998, the Petitioner clearly shows a profit with asset depreciation, which is distinctly different from the Petitioner's ability to pay the wage proffered. . . . Depreciation is a method used to take an asset's decreased value and show how it is not

worth what it originally was worth when first purchased by the business. . . . On income tax return, this reflects artificial losses, which are permissible under U.S. Tax Law.

Looking at the 1998 Income tax return as an example, and taking the proffered wage in annual basis, as it follows:

Depreciation	\$14,865
Agreement Fee	\$ 8,000
Salary Owner Cook	<u>\$ 4,120</u>
Total	\$26,965

The Petitioner would dispose of \$26,965 to cover the proffered wage of the beneficiary.

Although counsel states that the salary paid as compensation to officers was discretionary, this expenditure was already expended and those funds were not readily available to pay the wage of the beneficiary as of the filing date of the petition. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage. This is also true of the agreement fee.

A review of the 1996 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash at the end of the year (to the extent that total current assets exceed total current liabilities), the result is -\$278, \$20,183.60 less than the proffered wage.

A review of the 1997 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash at the end of the year (to the extent that total current assets exceed total current liabilities), the result is -\$1,642, \$21,547.60 less than the proffered wage.

A review of the 1998 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash at the end of the year (to the extent that total current assets exceed total current liabilities), the result is \$10,224, \$9,681.60 less than the proffered wage.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.